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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

A. Introduction 2

B. Proceedings Below 5

REASONS FOR DENYING THE WRIT 7

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR ANY OTHER COMPELLING REASON TO HEAR PETITIONER'S CONTENTION THAT THE COURT OF APPEALS ERRED IN FINDING THAT DRUG ENFORCEMENT ADMINISTRATION AGENTS LACKED THE STATUTORY AUTHORITY TO ARREST RESPONDENT IN MEXICO 7

II. THERE IS NO CONFLICT AMONG THE CIRCUITS OVER THE AVAILABILITY OF A "HEADQUARTERS" EXCEPTION TO THE "FOREIGN COUNTRY" EXCEPTION OF THE FTCA, WHERE FEDERAL OFFICIALS DIRECT THE COMMISSION OF TORTS COMMITTED OUTSIDE THE BOUNDARIES OF THE UNITED STATES 17

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Alvarez-Machain v. United States
331 F.3d 604 (9th Cir. 2003) 15, 18

Bowles v. United States,
950 F.2d 154 (4th Cir. 1991) 17

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103 (1948) 20

Cominotto v. United States,
802 F.2d 1127 (9th Cir. 1986) 18

Consumer Product Safety Comm'n v.
GTE Sylvania, Inc.,
447 U.S. 102 (1980) 13

Couzado v. United States,
105 F.3d 1389 (11th Cir. 1997) 17

DeMartinez v. Lamagno,
23 F.3d 402 (4th Cir. 1994) 18

Department of the Navy v. Egan,
484 U.S. 518 (1987) 20

EEOC v. Arabian American Oil Co.,
499 U.S. 244 (1991) 8, 9, 12, 13

Foley Bros. V. Filardo,
336 U.S. 281 (1949) 8

Frisbie v. Collins,
342 U.S. 519 (1952) 16

Glickman v. United States,
626 F.Supp. 171 (S.D.N.Y. 1985) 17-18

Haig v. Agee,
453 U.S. 280 (1981) 20

Hamdi v. Rumsfeld,
316 F.2d. 450 (4th Cir. 2003), *pet for cert. Filed* (Oct. 1, 2003) 14, 15

In re Agent Orange Product Liability Litigation,
580 F.Supp. 1242 (E.D.N.&. 1984) 18

In re Ross,
140 U.S. 453 (1891) 8

Ker v. Illinois,
119 U.S. 436 (1886) 16

Knudsen v. United States,
500 F.Supp. 90 (S.D.N.Y. 1980) 18

Kollias v. D&G Marine Maintenance,
29 F.3d 67 (2d Cir. 1994), *cert. denied,*
513 U.S. 1146 (1995) 10

Maul v. United States
274 U.S. 501 (1927) 9

McCulloch v. Sociedad Nacional de Marineros de Honduras,
372 U.S. 10 (1963) 8

Padilla ex. Rel. Newman v. Bush,
233 F.Supp.2d 564 (2002), *on reconsid. Sub nom., Padilla ex rel Newman v. Rumsfeld,*
243 F.Supp.2d 42 (2003), *mot. to certify appeal granted,*
256 F.Supp.2d 218 (S.D.N.Y. 2003) 14

Richards v. United States,
369 U.S. 1 (1962) 17

Sami v. United States,
617 F.2d 755 (D.C. Cir. 1979) 17

Smith v. United States,
507 U.S. 197 (1993) 7-8

Steele v. Bulova Watch Co.,
344 U.S. 280 (1952) 11

The Rosalie M.,
4 F.2d 815 (S.D. Tex. 1925), *aff'd on other grds.*, 12 F.2d 970
(5th Cir. 1926) 9

United States v. Alvarez-Machain,
504 U.S. 655 (1992) 5, 16

United States v. Bowan,
260 U.S. 94 (1922) 8, 9, 10, 11

United States v. Cedena,
585 F.2d 1252 (5th Cir. 1978), *overruled on other grds., United States v. Michelena-Orovio*,
719 F.2d 738 (5th Cir. 1983), *cert. denied*,
465 U.S. 1104 (1984) 10

United States v. Chen,
2 F.3d. 330 (9th Cir. 1993) 11

United States v. Keller,
451 F.Supp. 631 (D.P.R. 1978) 10

United States v. Lindh,
212 F.Supp.2d 541 (E.D. Va. 2002) 14

United States v. Noriega,
746 F.Supp. 1506 (S.D. Fla. 1990), *aff'd*,
117 F.3d 1206 (11th Cir. 1997), *cert. denied*,
523 U.S. 1060 (1998) 11

United States v. Postal,
589 F.2d 862 (5th Cir.), *cert. denied*,
444 U.S. 832 (1979) 10

United States v. Spelar,
338 U.S. 217 (1949) 19

United States v. Streifel,
507 F.Supp. 480 (S.D.N.Y.), *aff.d*
665 F.2d 414 (2d Cir. 1981) 10

United States v. Walczak,
783 F.2d 852 (9th Cir. 1986) 10

United States v. Yunis,
924 F.2d 1086 (D.C. Cir. 1991) 10

STATUTES AND REGULATIONS

10 United States Code
§374(b)(1)(D) 15

21 United States Code
§878(a)(3) 13

28 United States Code
§2680(k) 4, 6, 17, 19

Federal Rule of Criminal Procedure
Rule 29 5

OTHER AUTHORITIES

American Law Institute, Restatement (Third) of
Foreign Relations Law of the United
States
§§401 et seq. 9

Joseph Story, *Commentaries on the Conflict of Laws*
§20 8

Supreme Court Rule 10 2

No. 03-485

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United States of America.,

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Humberto Alvarez-Machain,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner United States of America. The United States seeks review of a well-reasoned ruling on a unique set of facts by the Court of Appeals sitting *en banc*, which correctly applied the applicable law upon which the circuit courts of appeal are not divided. Although the United States asserts that allowing the United States to be sued under the Federal Tort Claims Act ("FTCA") in these circumstances would seriously impair our Nation's ability to protect the national defense, this case simply does not present this Court with any pressing national security issues.

Rather, this case involves the decisions of relatively low-level Drug Enforcement Administration ("DEA") officials involved in bringing a criminal suspect to trial. Their decision to arrange for respondent to be kidnaped by private Mexican citizens hired by the DEA from his medical office in Mexico and brought to the United States for trial cannot be transformed *post hoc* into a decision with the kind of far-ranging consequences claimed in the petition. The possibility that the United States could be liable for tort damages for such conduct by low-level officials will not inhibit the war on terrorism or inhibit cooperation between the United States and foreign governments, where the President exercises his inherent and exclusive powers under Article II of the Constitution. The result below is a simple affirmation of the rule of law in circumstances where it was not respected.

The case presents no "compelling reason" for review under SUP. CT. R. 10. and is not a suitable vehicle for addressing the Government's broad concerns in the war on terrorism.

STATEMENT OF THE CASE

A. Introduction

Respondent opposes the petition for a writ of certiorari because the decision below is correct as a matter of law and warrants no further review. There is no split among the circuit courts on any of the issues presented in the petition. The United States does not seriously contend otherwise. Rather, the United States seeks review in this case by conjuring up

scenarios not raised by the facts in this case or the *en banc* decision below.

This case arises out of the transborder abduction of a criminal suspect from Mexico to the United States, authorized and orchestrated by DEA officials and carried out by private Mexican citizens who acted without legal authority. This case does not involve the authority of the President or cabinet officials to override international law to protect the national security of the United States. Nor does it address the authority of any U.S. agency other than the Drug Enforcement Administration to engage in extraterritorial arrests and other law enforcement activities or anti-terrorist activities. Thus, the Government's fears about the FBI or any other agency are simply not at issue in this case. Under the court of appeals' reasoning, Congress can provide DEA agents with extraterritorial arrest authority if it wishes and preclude similar claims in the future. In the absence of that legislative directive, a ruling from this Court allowing the *en banc* decision of the Ninth Circuit to stand will not compromise the ability of the United States government to defend the Nation.

What is at stake in this case is the rule of law. Basic principles dating back to the Magna Carta, enshrined in our Constitution and recognized in international human rights law, prohibit this kind of abuse of official authority. Though the factual setting is unique, it is unexceptional that the FTCA would be available to redress the abuse of governmental authority in these circumstances.

Petitioners' first question – whether federal law enforcement officials have the authority to arrest persons suspected of violating United States criminal statutes in

another country states the issue in this case with an implausible breadth and abstraction. The issue here is whether **DEA** officers had the authority to arrest a criminal suspect abroad using private agents in contravention of international and Mexican law based only on the notion that their law enforcement authority was co-extensive with the extraterritorial substantive reach of the criminal statute under which defendant was charged. There is no reason to believe that the officers involved in this operation believed they were authorized to arrest respondent in Mexico. Indeed, DEA agents in Mexico operated under strict restrictions on their authority. Presumably these low-level officials orchestrated a kidnaping by private Mexican citizens precisely because DEA agents lacked extraterritorial arrest authority. Moreover, the United States has identified no split in the circuit courts concerning the DEA's authority to engage in extraterritorial arrests.

Similarly, there is no conflict in the circuits regarding petitioner's second question – whether there is a "headquarters" exception to the "foreign activities" exclusion in 28 U.S.C. § 2680 (k). Every court of appeals to consider this question has determined that the United States may be found liable for the actions of federal officers whose decisions or actions within United States territory directly causes tort injuries outside the territory of the United States and that the intent of Congress in adopting the FTCA was to assure that government wrong-doing was compensable. This case would not be an appropriate vehicle to decide the contours of the "headquarters" doctrine because there has been no clarifying disagreement among the circuit courts on the existence, scope, or contours of the doctrine, let alone its clear applicability on facts like those in this case.

B. Proceedings Below

Respondent was abducted at gunpoint from his medical office in Guadalajara, Mexico, in April 1990. His kidnappers were private Mexican citizens paid by the DEA and acting without legal authority. He was transported to a nearby city, held overnight, and flown to El Paso, Texas, the next day where he was handed over to waiting DEA agents. All of these actions were orchestrated by the low-level federal officers named as defendants in this case. There is no hint in the extensive record of this case that the decision to kidnap respondent was approved by the President or any cabinet officer.

Respondent challenged the district court's jurisdiction and moved to dismiss his indictment, arguing *inter alia*, that his abduction was a violation of the U.S.-Mexican extradition treaty. Ultimately, this Court rejected respondent's treaty argument. *United States v. Alvarez-Machain* , 504 U.S. 655 (1992). Respondent went to trial in November 1992, and on December 14, 1992, the district judge granted a motion for a directed verdict of acquittal under FED. R. CRIM. P. 29, specifically finding that the Government's case was based on nothing more than "hunches."

Respondent filed this action on July 9, 1993, seeking damages for his April 1990 abduction, *inter alia*, under the FTCA for his false arrest and imprisonment. He filed administrative claims under the FTCA and added the United States as a defendant in an amended complaint filed in January 1994. The United States moved to substitute itself as a defendant under the Westfall Act for any claims respondent made against the federal officials named as defendants. This

motion was granted for all of the individual defendants except Francisco Sosa.

After years of discovery, the district court granted the United State's summary judgment motion with respect to respondent's FTCA claims. The district court granted a summary judgment against defendant Francisco Sosa with respect to respondent's claims under the Alien Tort Claims Act ("ATCA") and entered a judgment of $25,000 against him.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit. A panel of the Ninth Circuit affirmed the district court's judgment against Sosa under the ATCA and reversed the district court's FTCA ruling against the United States and remanded to the district court for further proceedings on those claims. The Ninth Circuit agreed to rehear the appeal *en banc* and, on June 3, 2003, affirmed its decision on respondent's FTCA claims.

The *en banc* majority found that respondent's abduction constituted arbitrary arrest and detention, holding that Congress did not grant DEA agents broad authority to enforce warrants, issued in the jurisdiction of the United States, beyond its borders. 331 F. 3d 604, 623-24 (2003). It further held that plaintiff's claims did not fit within the FTCA's waiver provision or in any of the statutory exclusions. The majority followed established precedent in holding that the "foreign activities" exception, 28 U.S.C. § 2680 (k), did not apply to injuries that are proximately caused by acts in the United States. The court found that respondent's abduction fit this "headquarters doctrine" "like

a glove," *Id.* at 638, as it was conceived and directed by the DEA officials in the United States. *Id.*

REASONS FOR DENYING WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR ANY OTHER COMPELLING REASON TO HEAR PETITIONER'S CONTENTION THAT THE COURT OF APPEALS ERRED IN FINDING THAT DRUG ENFORCEMENT ADMINISTRATION AGENTS LACKED THE STATUTORY AUTHORITY TO ARREST RESPONDENT IN MEXICO.

The United States' argument with respect to the DEA's arrest authority outside the borders of the United States reads as if it were part of a petition for certiorari in an entirely different proceeding. This case does not involve the arrest of a terrorism suspect abroad. It does not implicate the government's powers in such cases, or even in narcoterrorism cases. The actual issue in this case is whether Congress authorized the **Drug Enforcement Administration** to make extraterritorial arrests on facts like those in this case and intended for the FTCA to provide a remedy for such wrongs. Understandably, the United States chooses to downplay the issue of statutory authorization because it is aware that there is no *cert*-worthy conflict among the circuit courts on that issue and no pressing reason for this Court to review the question.

The presumption against extraterritorial application of the laws is well established. *Smith v. United States*, 507 U.S. 197, 204 (1993); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (hereinafter "*Aramco*"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). As noted by this Court in *In re Ross*, 140 U.S. 453, 464 (1891):

> When ... the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.

Accord, Joseph Story, *Commentaries on the Conflict of Laws* § 20 (Boston, Little, Brown, and Co. 6th ed. 1865) at 22 ("no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein . . . for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not resident within its own territory.")

The United States argues for the applicability of an exception to the rule against extraterritoriality, announced in *United States v. Bowman*, 260 U.S. 94, 98 (1922) (holding that federal criminal statute that does not specify extraterritorial application may nonetheless, in certain instances, prohibit overseas *conduct*). The United States' discussion of *Bowman* is disingenuous in that it devotes a page to *Bowman* without disclosing to this Court that *Bowman* (as well as the numerous lower court cases that cite *Bowman*) concerns whether a **substantive** criminal statute should be construed to have extraterritorial effect.

Neither this Court nor any court of appeals has found that the *Bowman* exception authorizes an extraterritorial *enforcement* power absent congressional authorization, and the distinction between the jurisdiction to legislate and the jurisdiction to enforce is basic in American law. *See, e.g.* American Law Institute, Restatement (Third) of Foreign Relations Law of the United States §§ 401 *et seq.* (1987) There is no conflict in the circuits on this issue, and this Court should deny the petition and permit the courts of appeals to continue to develop the law in this area.[1]

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[1] *Maul v. United States*, 274 U.S. 501, 510-11 (1927), construed a statute authorizing seizures by customs officers to apply to a Coast Guard seizure on the high seas. This Court cited *Bowman* and construed the statute to permit such seizures. However, this Court did not apply the *Bowman* exception to the presumption against extraterritorial application of statutes. Rather, the statute at issue permitted seizure by customs officials "as well without as within" their districts, *Maul*, 274 U.S. at 505, and this Court construed that language as authorizing seizures in international waters.

In *The Rosalie M.*, 4 F.2d 815, 816 (S.D. Tex. 1925), *aff'd on other grds.*, 12 F.2d 970 (5th Cir. 1926), the District Court did cite *Bowman* as justification for a seizure by a United States revenue cutter of a foreign-flagged boat in international waters. However, the court of appeals affirmed on a different ground, assuming the illegality of the seizure but holding that an illegal seizure did not deprive the courts of jurisdiction over the vessel. Every other lower court case that cites the *Bowman* extraterritoriality exception unambiguously concerns an issue of the substantive reach of a criminal statute.

Indeed, this Court's recent extraterritoriality cases, including the seminal *Aramco* case, do not even cite *Bowman*. As the Second Circuit has noted, this Court's caselaw has moved away from the *Bowman* analysis, rather than extending it in the unprecedented manner that the United States argues for. *See Kollias v. D&G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995). Moreover, *Bowman* itself recognizes the narrow breadth of its holding. The presumption against extraterritoriality has full application even to most criminal statutes, with the *Bowman* exception applying only to crimes that are "not logically dependent on their locality for the Government's jurisdiction". 260 U.S. at 98.[2]

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[2]The *Bowman* rule has also been invoked on the issue of the substantive reach of a criminal statute (which *Bowman* governs) in cases where the enforcement power was also at issue, but the courts relied on other authorities, and not *Bowman*, to find that the government agency at issue had enforcement power. *See United States v. Yunis*, 924 F.2d 1086, 1092-94 (D.C. Cir. 1991) (Navy has statutory and regulatory authority to assist in arrest in international waters); *United States v. Walczak*, 783 F.2d 852, 856-57 (9th Cir. 1986) (upholding a search by United States Customs agents conducted at Vancouver International Airport in British Columbia pursuant to an international agreement between the United States and Canada); *United States v. Postal*, 589 F.2d 862, 872 n. 15 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) (Coast Guard has *statutory* authority to board vessels); *United States v. Streifel*, 507 F. Supp. 480, 483-84 (S.D.N.Y.), *aff'd* 665 F.2d 414 (2d Cir. 1981) (same); *United States v. Cedena*, 585 F.2d 1252, 1257-58 (5th Cir. 1978), *overruled on other grds., United States v. Michelena-Orovio*, 719 F.2d 738, 757

Finally, it should be noted that the nonapplication of the *Bowman* exception to extraterritorial enforcement powers is entirely rational and sensible. As the United States itself notes, the main purpose of applying United States law outside the borders of this country is to govern conduct that has an adverse effect on the United States. *See Pet.* at 15 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286-88 (1952)). However, while the decision to apply this nation's laws to foreign activities that adversely affects the United States conceivably *could* offend a foreign government, in many cases it will not do so. In contrast, the decision to search, seize, and/or remove a foreign national in a foreign country would constitute a direct violation of the sovereignty of a foreign country.[3] If Congress wishes to allow such a

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(5th Cir. 1983), *cert. denied*, 465 U.S. 1104 (1984) (same); *United States v. Keller*, 451 F. Supp. 631, 637 (D.P.R. 1978) (same); *cf. United States v. Noriega*, 746 F. Supp. 1506, 1539-40 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11thCir. 1997), *cert. denied*, 523 U.S. 1060 (1998) (citing *Bowman* on substantive reach of statute, but ruling legality of military invasion of Panama to capture defendant was unreviewable political question). If *Bowman* were applicable to enforcement powers, there would have been no need for these courts to look to other legal authorities for authorization of the challenged enforcement activities. These cases are inapplicable in this case given the absence of explicit statutory authorization for extraterritorial arrest, the absence of any international agreement on the abduction, and the vigorous formal protest of the government of Mexico.

[3]The Court of Appeals persuasively contrasted this case with *United States v. Chen*, 2 F.3d 330, 333-34 (9th Cir. 1993),

momentous decision to be made by low-level government officers, in violation of the domestic and international law, it must say so explicitly.[4]

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which permitted the INS to conduct *investigatory* activities outside the United States. Such investigatory activities do not give rise to the same diplomatic offense and foreign sovereignty violations as the conduct proven in the case at bar.

[4]The United States argues that it is somehow incongruous for drug laws to have extraterritorial effect but for the DEA to not have extraterritorial enforcement power. It is worth noting that Congress (whose intent the courts are supposed to be discerning in this case) could remedy any such "incongruity" with an express grant of statutory power and has not done so. Additionally, the United States' fundamental premise is wrong– there are many ways in which federal drug laws may be enforced other than through mid-level DEA agents hiring shady bounty hunters to kidnap suspects in foreign countries over the objections of the sovereign. These include extradition requests, joint law enforcement efforts with foreign countries, and the use of federal agencies that **do** have express extraterritorial powers, such as the Coast Guard. Further, this case does not present the issue of whether the President may authorize an extraordinary rendition under the Commander-in-Chief power. In sum, there is no principle of law that says that just because Congress has prohibited conduct in a particular area, that any and all law enforcement tactics are automatically permitted with respect to the enforcement of the prohibition.

The United States also argues that even if the *Aramco* presumption applies, the text of the DEA arrest statute (along with a similarly worded statute relating to the FBI) permit extraterritorial enforcement. This is demonstrably incorrect: the selectively quoted language of 21 U.S.C. § 878(a)(3), *Pet. Cert.* at 17, simply contrasts arrests for offenses made within an officer's presence – for which no probable cause is required – with offenses made outside the officer's presence – for which probable cause is required. The language is completely silent on the issue of whether such arrests may be made extraterritorially.[5]

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[5]Further, the United States' statutory construction argument proves too much. Section 878(a) permits *state and local officials authorized by the Attorney General*, and not just DEA officials, to exercise the powers set forth therein. If the United States' argument is correct, then Congress unknowingly authorized local sheriff's deputies and health department inspectors to make warrantless seizures in foreign countries. The United States' argument simply demonstrates why the *Aramco* presumption offers wise counsel on matters of statutory construction.

The United States points to the generic statement in the legislative history that the DEA authorization statute was intended to provide the Attorney General with the flexibility to utilize enforcement personnel wherever and whenever the need arises. *Pet.* at 19 (citation omitted). But this language is clearly devoid of any context that would indicate that the issue of extraterritorial enforcement was even considered. As for Sen. Specter's precatory encouragement to the government to apprehend terrorists abroad, *Pet.* at 19-20 (citation omitted), that statement concerns terrorism, not drug

The United States' other argument for certiorari on this question is that the Court of Appeals' decision below would somehow implicate the war on terrorism. This argument is fanciful. This case is not about the military, the Commander-in-Chief power, the wars in Iraq or Afghanistan, the detention of aliens at Guantanamo Bay, or the war on terrorism – all of which are raised in other pending cases. This case arose out of the unlawful abduction, by Mexican bounty hunters engaged by United States DEA officials, of a Mexican doctor to the United States in order to face detention and trial in the Central District of California on a charge (abetting the murder of a DEA agent) that a respected federal judge eventually dismissed on the ground that it rested on hunches and speculation. Nothing in the Court of Appeals' opinion in any way restricts: (1) the power of the President to order the extraterritorial seizure of foreign nationals, (2) the power of the US military to capture individuals in the battlefield or in occupied territories, or (3) the power of the United States government to detain suspected foreign terrorists overseas pursuant to the broad statutory powers to fight terrorism.

Indeed, there are cases currently in litigation or recently litigated that raise exactly those issues, including *inter alia*: *Hamdi v. Rumsfeld*, 316 F.2d 450 (4th Cir. 2003), *pet. for cert. filed* (Oct. 1, 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (2002), *on reconsid. sub nom., Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (2003), *mot. to certify appeal granted*, 256 F. Supp. 2d 218

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law enforcement, and in any event, the views of a single legislator do not constitute cognizable legislative history. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

(S.D.N.Y. 2003); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D.Va. 2002). If this Court believes that it needs to settle such issues, it should review a case that raises them directly, rather than this case, where the only connection to the war on terrorism is the innuendo and the unrelated parade of horribles that runs throughout the United States' petition.

Most importantly, the war on terrorism is fundamentally distinguishable, because in that instance, Congress has granted broad authority to the military to carry out the war on terrorism. *Hamdi*, 316 F.2d at 467 (citing Pub. L. No. 107-40, 115 Stat. 224 (Sep. 18, 2001) (resolution authorizing President and military to use all necessary force against those that the President determines to have planned, authorized, committed, or authorized the September 11 terrorist attacks)). Further, even if such authority to enforce United States laws against terrorism had not been granted by Congress to the appropriate Executive Branch agencies, the correct forum for litigating the existence and scope of any inherent national security power of the executive branch to fight terrorism would be in a terrorism case with a fully developed record and not in the context of this case.[6]

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[6]The Court of Appeals also noted that even in the area of international terrorism, Congress both grants specific authority to the executive branch to enforce criminal laws overseas, and puts limits on that power. *Alvarez-Machain v United States*, 331 F.3d 604, 630 n. 34 (9th Cir. 2003) (en banc) (citing 10 U.S.C. § 374(b)(1)(D) (permitting Secretary of Defense to authorize personnel to operate equipment used in the rendition of a terrorism suspect, but not authorizing arrests)).

It is also important to remember that this case is a suit for damages– and the amount of damages ultimately awarded, $25,000, was quite modest. This Court has already held that an illegal seizure does not vitiate the power to try a criminal defendant. *United States v. Alvarez Machain*, 504 U.S. 655, 661 (1992); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886). The United States' argument seems to suggest that courts would award huge monetary recoveries to terrorists, so much so that the government might be deterred to take actions to save American lives. Such a scenario, even assuming all the questionable premises in the United States' argument, is not reasonable or plausible.[7]

No decision by this Court in this case will have any effect on the war on terrorism. The United States is simply using the war on terrorism as a subterfuge to ask this Court to involve itself in an unrelated dispute that does not present any conflict in the courts of appeals or any pressing question for review in this Court. If the government wants to expand the enforcement powers of the DEA, it should go to Congress and get the statutory authorization it seeks.

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[7]Indeed, the district court's judgment reflects the extraordinary difficulties of bringing a suit like this against the United States even in this context, where respondent is a Mexican doctor who was acquitted of all criminal charges and who was **not** a terrorist or accused terrorist.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS OVER THE AVAILABILITY OF A "HEADQUARTERS" EXCEPTION TO THE "FOREIGN COUNTRY" EXCEPTION OF THE FTCA, WHERE FEDERAL OFFICIALS DIRECT THE COMMISSION OF TORTS COMMITTED OUTSIDE THE BOUNDARIES OF THE UNITED STATES.

Petitioner argues that the "foreign country" exception of 28 U.S.C. 2680(k) bars recovery in this case. In so doing, petitioner argues for a wholly unprecedented and unsupported interpretation of FTCA and the "foreign country" exception.

In *Richards v. United States*, 369 U.S. 1 (1962), this Court focused the inquiry in FTCA claims to the location where acts or omissions *causing* the injury took place, rather than the location where the injury itself occurred. The courts of appeal have unanimously interpreted this principle to give rise to a "headquarters" claim, where decisions made within the United States cause harm in a foreign country. *See also Sami v. United States*, 617 F.2d 755, 761 (D.C. Cir. 1979)("the entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred"). In interpreting 28 U.S.C. 2680(k)'s exception for claims "arising in a foreign country," courts have applied this FTCA focus, to find that injuries occurring in foreign countries, caused by wrongful acts or omissions in the United States, "arise" in the United States. *See Couzado v. United States*, 105 F.3d 1389 (11th Cir. 1997); *Bowles v. United States*, 950 F.2d 154 (4th Cir. 1991); *Glickman v. United States*, 626 F. Supp. 171 (S.D.N.Y.

1985); *In re Agent Orange Product Liability Litigation*, 580 F. Supp. 1242 (E.D.N.Y. 1984).

The validity of the headquarters doctrine has not been questioned by the lower courts, and even those cases that have declined to apply this doctrine have done so on the basis of insufficient evidence or the failure to establish proximate causality, not on the validity of the doctrine itself. *See De Martinez v. Lamagno*, 23 F.3d 402 (4th Cir. 1994)(finding that the plaintiffs had failed to establish the plausible proximate nexus between acts or omissions in the United States and the resulting damage in a foreign country necessary to establish a headquarters claim), judgment rev'd on other grounds, 515 U.S. 417 (1995); *Cominotto v. United States*, 802 F.2d 1127 (9th Cir. 1986)(similar); *Knudsen v. United States*, 500 F. Supp. 90 (S.D. N.Y 1980)(finding that there was no issue of fact as to proximate causation because the plaintiff had failed to provide evidence to counter the governments assertions that all relevant activities had occurred abroad).

As the *en banc* decision noted, the facts of Respondent's abduction fit the headquarters doctrine "like a glove." *Alvarez-Machain v. United States*, 331 F.3d 604, 638 (9th Cir. 2003). DEA agents made the decision to falsely arrest and imprison Dr. Alvarez, gave precise instructions on recruiting and the operation itself, and supervised Alvarez's transportation to the United States. The United States served as "command central." *Id.* at 639.

Because it cannot, petitioner does not challenge the strength of the headquarters doctrine on its face, but rather, argues against it on policy grounds – arguing that it would be an impermissible judicial intervention in the affairs of the

executive branch. Petitioner justifies this radical departure from accepted FTCA jurisprudence by presenting a novel purpose for the "foreign countries" exception – that of preventing judicial intervention into matters of foreign relations. Pet. Cert., at 28. Petitioner provides no source from which this purpose was derived. In fact, this Court's own findings about the purpose of the "foreign country" exception directly contradict petitioner's claim.

In *United States v. Spelar*, this Court found that the 28 U.S.C. 2680(k) exception resulted from Congress' "unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power," 338 U.S. 217, 221 (1949), and not from any concern over judicial intervention in foreign affairs. Moreover, the Court found that Congress *was* "ready to lay aside" much of the executive's sovereign immunity, thus subjecting the executive branch to judicial review of its potentially tortious actions. *Id.*

Finally, in arguing that the application of the headquarters doctrine would be an impermissible judicial intervention in foreign relations, petitioner mischaracterizes the type of judicial intervention that the FTCA permits in this case. In granting Dr. Alvarez relief for his injuries, the Court would not be changing any policy decision made by the executive branch. It would merely be requiring that Dr. Alvarez be compensated for injuries resulting from the DEA's tortious activities.

This is one crucial way in which this case is distinguished from the cases petitioner cites to support its strict interpretation of judicial intervention. Each of the cases

petitioner cites involves instances in which the judicial review could require the executive to change a policy or reverse a decision. *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (involving a request for review of a decision by the Civil Aeronautics Board to deny a request for a certificate); *Department of the Navy v. Egan*, 484 U.S. 518 (1987) (involving a review of a decision to respondent Egan from Navy because of national security concerns); *Haig v. Agee*, 453 U.S. 280 (1981)(involving a request to block revocation of passport).

In granting Dr. Alvarez relief, the district court will not intervene in the activities of the Executive Branch. The district court will not review or require a change in any policy or decision of the executive. Rather, the Court will be doing exactly what the FTCA permits, compensating a person injured by the tortious activities of the federal officials. This is a traditional judicial function authorized by Congress.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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Respectfully Submitted,

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